UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
450 MAIN STREET
HARTFORD, CONN. 06103

December 31, 2002

Honorable Samuel A. Alito, Jr.
Committee on Rules of Practice and
Procedure
Judicial Conference of the United States
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Sam:

I bring to your attention an issue that has divided a panel of our Court concerning the proper interpretation of Rule 4(a)(4)(vi) of the Federal Rules of Appellate Procedure. Because it is important that provisions concerning timeliness of appeals be as clear as possible, this is a matter the Advisory Committee on Appellate Rules might wish to clarify. The issue is whether the provision of Rule 4(a)(4)(vi) applies to all motions filed under Rule 60 of the Federal Rules of Civil Procedure within 10 days after entry of judgment, or only to ten-day motions filed under Rule 60(b). In other words, are ten-day motions filed under Rule 60(a) covered by Rule 4(a)(4)(vi)?

This issue divided the panel in Dudley v. Penn-America Insurance Co., __ F.3d __, No. 01-9215 (2d Cir. Dec. 5, 2002). In an opinion by Judge Pooler, the panel majority ruled that a Rule 60(a) motion, filed within ten days of a judgment, qualifies under Rule 4(a)(4)(vi) as a motion that postpones the start of the time for appeal until entry of the order disposing of the motion. Judge Pooler's opinion includes the following statements:

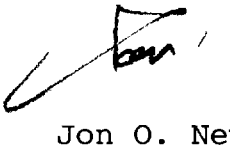
> We note that it makes no practical difference in this case whether the district court construed Dudley's motion under Rule 60(a), as of course it did, or under Rule 59(e) as seeking an alteration or amendment to a judgment, or under Rule 60(b) as seeking relief from a mistaken judgment. . . . A timely motion under any of these provisions that also meets applicable time constraints of Rule 4 resets the time to file a notice of appeal to run from the entry of the order disposing of the motion. . . . Moreover, it [Rule 4] makes no distinction between Rule 60(a) and Rule 60(b).

Slip op. p. 5400.

In dissent, Judge Sotomayor noted that Rule 4(a)(4)(vi) specifies motions "for relief under Rule 60," slip op. p. 5415, and contended that a motion under Rule 60(a) "cannot be said to be 'relieving' a party of anything," slip op. 5416. Judge Sotomayor also expressed the view that the Advisory Committee's note to the 1993 amendments indicated an intention to comport with the practice of those circuits that had permitted ten-day motions making a substantive attack on a judgment to extend the time for appeal. Slip op. 5416-17. She also noted decisional law ruling that a trial judge's sua sponte non-substantive correction of a judgment does not restart the time for appeal, citing Farkas v. Rumore, 101 F.3d 20, 22 (2d Cir. 1996), and contended that no distinction should be drawn, for purposes of timeliness of an appeal, between a trial judge's non-substantive correction of a judgment, and a party's non-substantive correction under Rule 60(a). She acknowledged that Rule 4(a)(4)(vi) is not in terms limited to motions under Rule 60(b), but concluded that the other considerations she had identified persuaded her that Rule 4(a)(4)(vi) does not apply to ten-day motions under Rule 60(a).

I take no position on the issue, but believe that when able judges express differing views on a recurring issue like timeliness of an appeal, clarification from the Advisory Committee on Appellate Rules, either by amendment of the rule or some supplement to the note on the 1993 amendment would be helpful. Parties ought not to be left uncertain about this issue, and it should not remain a source of future litigation.

Sincerely,



Jon O. Newman
U.S. Circuit Judge